



3 1761 10356305 2

Castel, Jean Gabriel  
International law,  
chiefly as interpreted  
and applied in Canada.  
2d ed. rev.



YORK  
UNIVERSITY

OSGOODE HALL LAW SCHOOL

JX  
3110  
.C35  
I5  
1973  
v.1



Store  
JX  
C37  
1973  
V.1

# International Law

CHIEFLY  
AS INTERPRETED  
AND APPLIED IN  
CANADA

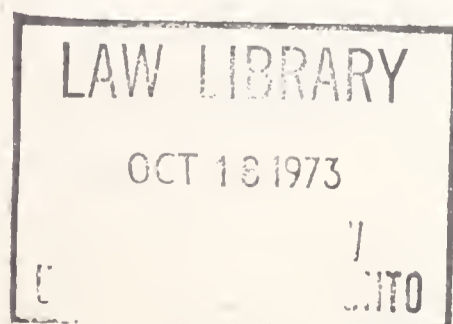
S E C O N D   R E V I S E D   E D I T I O N

By J.-G. CASTEL

S. J. D. HARVARD  
*Professor of Law*  
*Osgoode Hall Law School*  
York University

---

Reprinted with the permission  
of  
UNIVERSITY OF TORONTO PRESS  
1973





## TABLE OF CONTENTS

Preface	1
Introduction	3
 Part I: General	 5
Chapter I Definition, Nature and Sources of International Law	5
A) Definition	5
✓ B) Legal Nature, Function, and Basis of Obligations in International Law	5
1) Legal Nature	5
2) Function	7
3) The Basis of Obligations	7
C) The Determination of the Rules of International Law: Modern Sources of International Law	12
1) Treaties and International Conventions	12
2) Custom	13
The Paquete Habana. The Lola	15
The Scotia	21
The SS Lotus	25
North Sea Continental Shelf Cases	26
3) General Principles of Law Recognized by Civilized Nations	28
4) Judicial Decisions and the Teachings of the Most Highly Qualified Publicists of the Various Nations as Subsidiary Means for the Determination of Rules of Law	29
i) Judicial decisions	29
ii) The teachings of publicists	29
West Rand Central Gold Mining Company, . Limited v. The King	29
D) History of International Law: Selected Bibliography	33
E) Theory: The Leading Writers on International Law: Selected Bibliography	33
F) The Codification of International Law	35
 Chapter II Authority and Application of International Law in Canadian Courts	 38
✓ A) Common Law Doctrine of Adoption or Incorporation	38
B) Canada	39
C) The Relation of International Law to Municipal (Canadian) Law: Possible Conflicts	42
Re Arrow River and Tributaries Slide and Boom Co. Ltd.	42
D) Selected Reading: May the Provinces Legislate in Violation of International Law?	48
 Chapter III The Domain of International Law	 56
✓ The Cayuga Indians Claim	56



Digitized by the Internet Archive  
in 2018 with funding from  
University of Toronto

Part II: International Personality	61
Chapter IV The Subjects or Persons of International Law	61
A) General Notion of Sovereign States in International Law-- Definition of States--Birth of States--Characteristics of Sovereign States	61
United States v. Kusche	62
B) Sovereignty--Independence--State Equality--Friendly Relations and International Co-operation	64
1) Sovereignty	64
2) Independence	64
i) General	64
ii) Right to self-determination	65
iii) Intervention	69
3) Equality	71
4) Friendly Relations and International Co-operation	72
C) International Persons Other Than States	79
1) United Nations Charter	79
Reparation for Injuries Suffered in the Service of the United Nations	79
2) The Organization of American States	84
3) Custom and Economic Unions	86
i) Treaty establishing the European Economic Community	86
ii) Treaty establishing the European Coal and Steel Community	87
iii) The European Atomic Energy Community	88
4) Individuals as subjects of International Law	88
In re Flick and Others	89
D) Recognition of States and Governments	90
1) General	90
i) By Whom	91
ii) Method	92
a) States	92
b) Governments	93
Duff Development Co. v. Kelantan Government	100
2) Distinction between <i>de jure</i> and <i>de facto</i> governments and <i>de facto</i> and <i>de jure</i> recognition	108
3) Legal Effects of Recognition	109
Carl Zeiss Stiftung v. Rayner & Keeler Ltd.	110
The Arantzazu Mendi	115
Bank of Ethiopia v. National Bank of Egypt and Liguori	117
Haile Selassie v. Cable and Wireless Limited (No. 2)	119
Wulfsohn v. Russian Federated Soviet Republic	122
Salimoff & Co. v. Standard Oil Co. of New York	123
4) Retroactivity of Recognition	125
Luther v. Sagor	125
5) Recognition of Belligerency: Insurgency	130
United States v. Three Friends	131
G) Continuity of States--Extinction of States and State Succession in International Law	133
1) Continuity of States	133
The Sapphire	134
Lehigh Valley Railroad Co. v. The State of Russia	135
The Tinoco Concessions	137



2) Extinction of States and State Succession	140
i) General	140
Claim of Robert E. Brown	143
The Hawaiian Claims	146
ii) Canada	146
a) Effect of Conquest by Great Britain and Subsequent cession by France in 1763	146
b) Newfoundland	151
 Part III: State Jurisdiction	 155
Chapter V Forms of State Jurisdiction: Territorial and Personal	155
The Steamship Lotus	155
✓ Chapter VI The Territory of States	161
A) Acquisition of Territory	161
The Island of Palmas	161
Legal Status of Eastern Greenland	172
B) Polar Regions	178
1) Arctic	178
Regina v. Tootalik E4-321	200
2) Antarctic	203
C) Air Space and Outer Space	205
1) Air Space and Air Law	208
i) Historical background	208
ii) International Civil Aviation Organization	211
a) General	211
b) Work	212
iii) Private Air Law Conventions	214
iv) Public Air Law Conventions	222
v) Future Trends in the Air Law Field	227
2) Outer Space and Space Law	233
i) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies	233
ii) Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space	234
iii) Convention on International Liability for Damage Caused by Space Objects	236
iv) Future Trends in the Space Law Field	240
D) Land Frontiers of Canada	245
E) Maritime Frontiers	262
i) General	263
The North Atlantic Coast Fisheries	263
Anglo-Norwegian Fisheries Case	271
The Territorial Sea and Fishing Zones Act	280
ii) Bays and Gulfs	287
Direct United States Cable Company v. Anglo-American Telegraph Company	287
The King v. Boutilier	290
Re Dominion Coal Co. and County of Cape Breton	292
iii) Islands	303
iv) Geneva Convention on the Territorial Sea and the Contiguous Zone	305



v) Specialized Conference of Caribbean Countries Concerning the Problems of the Sea. Declaration of Santo Domingo	308
F) Continental Shelf	309
i) Introduction	309
ii) Historical Background	312
iii) The International Regime	312
a) The 1958 Geneva Convention on the Continental Shelf	312
b) The North Sea Continental Shelf Cases	316
c) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil thereof	324
iv) Canada and her Continental Shelf	327
a) Reference Re Ownership of Off-shore Mineral Rights	329
b) Re Dominion Coal Co. and County of Cape Breton	332
c) Canada: Special Problems	338
v) Future Trends: Delimitation of the Outer Limits of the Continental Shelf	341
G) The Seabed Beyond the Limits of National Jurisdiction	343
i) Introduction	343
ii) Developments in the United Nations	344
iii) Proposals	362
a) The International Regime proposed by the International Law Association	362
b) President Nixon's Announcement of United States Ocean Policy (1970)	364
c) 1972 Declaration of Santo Domingo	364
d) The Canadian Position as Regards a Legal Regime to be Established Over the Seabed, beyond the Limits of National Jurisdiction	365
H) The Great Lakes - The Chicago Diversion - Boundary Waters	371
i) International Rules: Helsinki Rules	371
ii) Conventional Rules	
a) The Boundary Waters Treaty of 1909 and the International Joint Commission	375
b) Survey of Boundary Waters: Principal Rivers and Lakes	383
1) Lake Michigan and the Chicago Diversion	384
The Grace	395
Rex v. Meikleham	401
2) Some Major Canadian-American Rivers	401
a) The Pigeon River	401
b) The Rainy River	401
c) St. Mary and Milk Rivers	401
d) The Niagara River and Falls	402
e) The St. Lawrence River, St. Lawrence Seaway	402
f) Arbitration of Lake Ontario (Gut Dam) Claims	411
g) Richelieu Waterway	413
h) The Columbia River	414
i) The St. John River	419



I) Servitudes	
North Atlantic Coast Fisheries	421
Chapter VII Nationality and Individuals in International Law	427
A) Nationality	427
1) General Observations	427
Nottebohn Case	427
2) Canadian Practice	428
i) Jurisdiction over "Naturalization and Aliens"	
constitutional problems	429
ii) Canadian Citizenship Act	430
a) Historical Background	430
b) An Act Respecting Citizenship, Nationality,	
Naturalization and Status of Aliens	432
c) Acquisition of Nationality	448
d) Naturalization	448
Dowhopoluk v. Martin et al	448
iii) Recognition of changes of Nationality by Third	
States	453
Nottebohn Case	453
iv) Effect of Marriage on Nationality	454
v) British Subjects	455
vi) Double Nationality	455
vii) Loss of Citizenship	456
viii) Statelessness - Refugees	456
ix) Proof of Nationality	461
B) Aliens	463
1) Admission of Aliens - Immigration	463
The Immigration Act	470
2) Deportation of Aliens	492
3) Status of Aliens in Canada in Time of Peace:	
Rights and Duties	499
4) Protection Due to Aliens at International Law	501
C) Nationality of Corporations	502
Daimler Co. v. Continental Tyre & Rubber Co.	502
D) Nationality of Ships and Aircraft	506
1) Ships	506
i) 1958 Geneva Convention on High Seas	506
ii) Canada Shipping Act	507
2) Aircraft	508
E) Extradition - Rendition	509
1) General Principles	510
2) Procedure for Extradition	513
a) General	513
b) U.S.A.	514
3) Exception for Political Refugees	515
4) Principle of Double Criminality	515
5) Principle of Specialty	515
6) Need for Cooperation	516
F) International Civil Procedure:	
Serving Documents Abroad - Letters Rogatory	517
G) Asylum	525
The Asylum Case	525
Haya de la Torre Case	526



H) Human Rights and Fundamental Freedoms	530
1) Internationally Protected Human Rights	530
2) International Charters, Declarations, Covenants and Conventions	530
3) The United Nations and the Universal Declaration of Human Rights	533
i) International Conference on Human Rights	537
ii) Elimination of Racial Discrimination	538
iii) Elimination of All Forms of Religious Intolerance	542
iv) Capital Punishment	542
v) Human Rights in Armed Conflicts	543
vi) Human Rights in Occupied Territories	545
vii) Freedom of Information	546
viii) Legal Aid	547
ix) Creation of Post of United Nations High Commissioner for Human Rights	547
x) Declaration on Elimination of Discrimination Against Women	547
4) The Charter of the United Nations and the Recognition of Human Rights by Municipal Courts	552
Re Drummond Wren	552
Re Noble and Wolf	554
5) The European Convention on Human Rights	555
Chapter VIII Extent of State Jurisdiction	557
A) Territoriality and Extraterritoriality of Laws	557
1) Territorial Jurisdiction	557
2) Extraterritorial Jurisdiction	559
3) Case Law	560
Regina v. Anderson	560
Rex v. Kizo Furuzawa (No. 2)	560
4) Protective Jurisdiction: The Contiguous Zone	562
B) Jurisdiction over Vessels in Territorial Waters and the Contiguous Zone	562
1) Innocent Passage	562
The Corfu Channel Case	563
The Ship D. C. Whitney v. The St. Clair Navigation Company	570
Fudge v. The King	571
1958 Geneva Convention on the Territorial Sea and the Contiguous Zone	572
2) Right of Distress	573
The May v. The King	574
The Queen City v. The King	576
Cashin v. The King	578
Rex v. Flahaut	579
3) Third Law of the Sea Conference: The Canadian Position	581
4) Innocent Passage in Arctic	582
5) Hovering	583
Croft v. Dunphy	585
Cashin v. The King	587
Mason v. The King	590
6) Hot Pursuit	592
The "I'm Alone"	593
The Ship "North" v. R.	598
7) Foreign Vessels in Canadian Ports: Labor Unions	600
McCulloch v. Sociedad de Marineros de Honduras	600
McLeod v. Empresa Hondurena de Vapores S. A.	601
8) ADIZ -CADIZ	605
9) Violation of Foreign Territorial Waters	608



C) Jurisdiction over Vessels on the High Seas	610
1) Freedom of the Seas	610
2) Illicit Trade - Arrest or Seizure on the High Seas	614
Church v. Hubbard	614
3) Collision on the High Seas	616
The Scotia	616
4) 1958 Geneva Convention on the High Seas	618
D) Personal Jurisdiction and Criminal Law	621
Chung Chi Cheung and King	623
The Cutting	628
The Official Secrets Act	630
The Canada Shipping Act	632
E) Jurisdiction According to the Universal Principle: Piracy	
Jure Gentium	636
In re Piracy Jure Gentium	639
The Chesapeake	641
F) Customary and Conventional Limitations upon the	
Jurisdiction of States	642
1) Rights and Privileges of Foreign States, and	
Sovereign or Head of States, in the Courts of	
other States	642
Queen of Holland v. Drukker	642
2) Immunity of Foreign States and Sovereigns or	
Heads of States	644
i) The Foreign State, Sovereign or Head of	
Foreign State as a Defendant in Canadian Courts	644
ii) Property of the Foreign State, Sovereign or	
Head of State	647
iii) Acta Imperii and Acta Gestionis:	
The Doctrine of Limited Immunity	648
Le Gouvernement de la République	
Democratique du Congo v. Jean Venne	655
3) Rights, Duties, Privileges, and Immunity of	
Foreign Diplomats and Consuls	665
i) Diplomats	665
a) Vienna Convention on Diplomatic Relations	668
Rose v. The King	680
ii) Consuls	687
Vienna Convention on Consular Relations 1963	692
iii) International Organizations	703
iv) Foreign Armed Forces	703
v) Waiver of Immunity	704
Chapter IX International Protection of the Environment	708
A) General Principles	708
i) Introduction	709
ii) Stockholm Conference on the Human Environment	
June 1972 and Declaration of Principles	711
B) Marine Environment: A Multinational Approach	716
1) Elements of a Comprehensive Approach	717
2) Draft Articles for a Comprehensive Marine Pollution	
Convention submitted by the Delegation of Canada	739
3) What Remains to be done	750
C) Marine Scientific Research: The Canadian Position	751
D) Pollution in the Arctic - A National Approach:	
The Arctic Waters Pollution Prevention Act, 1970	753
E) Pollution on the Great Lakes and Canadian - American	
Rivers - A Bilateral Approach	765
1) Constitutional Problems	766
2) International: Helsinki Rules	774
3) The International Boundary Waters Treaty and the	
International Joint Commission	782
i) Lake Erie, Lake Ontario and the International	
Section of the St. Lawrence River	784



F) Air Pollution	792
The Trail Smelter Arbitration	792
Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water	802
International Joint Commission Report on Trans-boundary Air Pollution in the Detroit and St. Clair Rivers Area	803
Chapter X The Conservation of the Living Resources of the Sea and Air	805
1) Living Resources of the Sea	805
i) General Principles	806
ii) Canadian Law	811
An Act Respecting the Territorial Sea and Fishing Zones of Canada	812
Fisheries Closing Lines	816
Coastal Fisheries Protection Act	818
The Fisheries Act	822
iii) International Treaties	826
a) Bilateral Treaties	826
The Great Lake Fisheries Convention Act	827
The Northern Pacific Halibut Fisheries (Convention) Act	828
b) Multilateral Treaties	831
The North Pacific Fisheries (Convention) Act	831
The Northwest Atlantic Fisheries (Convention) Act	834
The North Pacific Fur Seals (Convention) Act	837
The Whaling (Convention) Act	840
c) The United Nations	843
Convention on Fishing and Conservation of the Living Resources of the High Seas	843
d) The Third Conference on the Law of the Sea and the Management of the Living Resources of the Sea - Canada's position	846
2) Living Resources of the Air	854
3) Scientific Investigation of Natural Resources	855
Part IV International Agreements	857
Chapter XI The Law of Treaties	857
A) Introduction	857
1) Statutory Material	858
a) International	858
b) Canadian	859
2) Definition	859
B) General	860
1) Nature, Form, Types, Contents of Treaties	860
2) Power to make Agreements: Constitutional Problems: Parties	866
In the Matter of the Reciprocal Enforcement of Maintenance Orders Act	874
3) Process of Treaty-Making	875
i) Negotiation	875
ii) Signature and Full Powers	876
iii) Adherence and Accession	880
iv) Ratification and Role of Parliament	881
v) Publication and Registration of Treaties	890
vi) Language and Authenticity of Treaties	893
vii) Proof of Treaties in Canadian Courts	897
viii) The British Commonwealth	898



4) When Does a Treaty Come Into Force	899
i) Entry into Force	899
ii) Retroactive Effect	900
In re Cannon	900
5) Reservations	902
6) Effect of Treaties	911
i) Inter Parties	911
ii) Third Parties	912
Free Zones of Upper Savoy and the District of Gex	912
7) Most Favoured Nation Clauses	914
8) Rights of Individuals Under a Treaty	915
C) Treaties and Municipal Law	916
1) Implementation of Treaties in Canada	916
i) Necessity of Implementation by Parliamentary Action	916
ii) Methods of Implementation: federal or provincial legislation	923
a) Empire Treaties	923
b) Treaties not coming within the scope of Section 132	923
c) Case law	928
In re Regulation and Control of Aeronautics in Canada	928
In the Matter of Legislative Jurisdiction over Hours of Labour	935
Attorney General for Canada v. Attorney General for Ontario	936
Konrad Johannesson and Holmfridur Johannesson v. The Rural Municipality of West St. Paul and the Attorney General of Manitoba and the Attorney General of Canada	944
2) Conflict between Statute and Treaties	947
In the Matter of the Authority of the Legislature of B.C. to Pass "an Act to validate and confirm certain Orders in Council and Provisions Relating to the Employment of Persons on Crown Property"	947
The King v. Stuart	951
In re Nakane and Okazave	953
D) Interpretation of Treaties	955
Interpretation of Peace Treaties of 1947 with Bulgaria, Hungary, and Romania	955
The David J. Adams	961
The J. H. Nickerson	963
E) Amendment and Modification of Treaties	966
F) Invalidity, Termination and Suspension of the Operation of Treaties	967
1) General	967
2) Invalidity of Treaties	968
3) Termination and Suspension	970
Ex Parte O'Dell and Griffen	971
The Free Zones of Savoy and Gex	976
4) Procedure	978
5) Consequences of the Invalidity, Termination or Suspension of the Operation of a Treaty	979
G) Miscellaneous Provisions of the Vienna Convention on the Law of Treaties	981
1) Cases of State Succession, State Responsibility and Outbreak of Hostility	981
Francis v. R.	981
Society for the Propagation of the Gospel in Foreign Parts v. New Haven	983
Karmuth, Director of Immigration et al v. United States ex rel Albro	986



Part V: The International Responsibility of States	989
Chapter XII State Responsibility and International Claims	989
A) General Principles of International Responsibility	990
i) Definition and scope of topic	990
General Assembly Resolutions on Permanent Sovereignty over Natural Resources	
ii) 1962	995
iii) 1966	997
B) Active Subjects of International Law	999
1) Acts or Omissions for which a State is Internationally Responsible: e.g. Breach of International Obligations	999
i) Tortious Conduct	999
Lake Ontario Claims Tribunal and Lump sum Settlement of Disputes Concerning Gut Dam	1000
The Wanderer	1001
The Jessie, Thomas F. Bayard, and Pescawha Cadenhead	1003
United States (T. H. Youmans Claim) v. United Mexican States	1004
United States (B. E. Chattin Claim) v. United Mexican States	1006
ii) Breach of Treaty, Contract or Concession	1008
iii) Confiscation, Expropriation, Nationalization	1018
Canadian Practice	1021
Illustrations	1026
France	1029
Cuba	1031
Yugoslavia	1031
Soviet Union	1033
Eastern European States	1034
Barcelona Traction Light and Power Company Limited	1036
Amount of Compensation	1051
Extraterritorial Effect of Expropriation or Nationalization Decrees in Canada	1054
Ado Laane and Frederick Baltser v. The Estonian State Cargo and Passenger Steamship Line	1055
iv) Canadian Regulation of Foreign Investment in Canada	1062
The Foreign Investment Review Act, 1973	1073
v) Canada and Multi-National Enterprises	1074
vi) Canadian Protection of Canadian Foreign Trade and Investments	1078
vii) International Protection of Canadian Trade and Investments	1079
Convention on the Settlement of Investment Disputes Between States and Nationals of Other States	1080
2) The Problem of Imputability	1089
C) The Passive Subjects of International Responsibility	1092
1) Who May Bring a Claim?	1092
2) Nationality of Claimant	1094
D) Miscellaneous Substantive and Procedural Matters	1096
1) Exhaustion of Local Remedies	1096
United States (The R. T. Roy) v. Great Britain	1097
2) Waiver of Diplomatic Protection. The Calvo Clause	1099



United States (North American Dredging Co.) v. Mexico	1100
3) Defences: Waiver and Compromise of Claims	1102
United States (The Tattler Claim) v. Great Britain	1102
E) The Duty to make Reparation: Nature and Measure of Damages	1104
The Lusitania Cases	1104
Part VI The Law of Peace	1109
Chapter XIII Pacific Settlement of International Disputes	1109
1. General	
A) Settlement Through the United Nations	1109
i) Pacific settlement	1110
ii) Forcible Settlement	1111
iii) Problems involving Article 2(3) of the United Nations Charter	1116
iv) Problems of Interpretation of Article 2(4) of the United Nations Charter	1117
v) The notion of Domestic Jurisdiction	1118
a) League of Nations Covenant	1118
b) United Nations Charter	1118
Canada	1118
vi) Political and Legal Disputes	1124
B) Pacific Settlement under the Charter of the Organization of American States	1126
C) Bilateral Settlement	1127
United States - Great Britain Treaty of 1914	1127
2. Non-Adjudicatory Procedures	1128
A) Good Offices - Mediation	1128
B) Negotiation	1129
C) Commissions of Inquiry	1131
Convention for the Pacific Settlement of International Disputes	1131
D) Conciliation	1135
3. Adjudication of International Disputes	1135
A) Arbitration	1135
i) General	1135
Convention for the Pacific Settlement of International Disputes	1136
ii) The Permanent Court of Arbitration	1138
iii) Illustrations	
Great Britain - United States 1910	1141
United States - Canada	
Claims Relating to Gut Dam	1144
iv) Res Judicata and Revision of Awards	1144
The Trail Smelter Arbitration	1144
B) Judicial Settlement	
The International Court of Justice	1151
i) The Statute and Rules of Court	1151
a) The Statute	1151
b) Rules of Court	1152
c) Members of the Court	1152
d) Sessions	1153
e) Organisation	1153
f) Application of International Law	1153
g) Decisions and Voting Procedure	1153
h) The Court's Jurisdiction	1154



1. Competence	1154
2. Contentious Cases submitted to the Court	1155
3. Basis of court's jurisdiction	1157
a) Special agreement	1157
b) Cases provided for in treaties and Conventions	1157
c) Compulsory jurisdiction	1157
d) The Court decides the question of its own jurisdiction	1160
e) Interpretation of a Judgment	1160
f) Revision of a Judgment	1160
4. Jurisdiction as an Advisory Body	1160
5. Other Activities	1161
i) Reforms	1162
j) Role of the International Court of Justice	1166
Appendix: Selected Bibliography	1167

